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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-471

JOHN W. COLLIS, *Petitioner*
Vs.
KENTUCKY BAR ASSOCIATION, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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October 13, 1975

PRESS OF KENTUCKY INVESTORS, INC., FRANKFORT, KENTUCKY

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OPINION BELOW

The opinion of the Kentucky Court of Appeals (Petition, Appendix, pp. 1a - 4a) is unreported at this time.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Kentucky Court of Appeals.

RULES INVOLVED

Kentucky Court of Appeals Rules Concerning Procedures in Disciplinary Cases

3.380 Degrees of Discipline

Upon finding by the Board of guilt or unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or by the Court, under RCA 3.320, or upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statute 30.170:

30.170 Court rules governing practice of law and state Bar

(1) The Court of Appeals shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form of its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

STATEMENT OF THE CASE

Petitioner seeks to argue limited facts in this case out of context, therefore, a detailed statement of facts will assist the Court in its determination of this matter.

A six-count charge was filed against petitioner by respondent on September 4, 1974. The first count relates to petitioner's failure to segregate monies in the sum of $2,289.26 entrusted to him by his client, James Hollie Taylor, in an identifiable escrow bank account. (Transcript of Proceeding Before Trial Committee, Vol. II, 57; III, 26-27). When Mr. Taylor requested payment of the escrow funds, petitioner issued a check for $2,095.28 which was subsequently dishonored for insufficient funds. (Vol. II, 66).

Count II of the charge relates to petitioner's failure to satisfy an outstanding mortgage on realty in a land closing transaction when his client, Mike H. Pappas, had paid the full purchase price of $19,000.00 to petitioner with the intention and understanding that all debts of the transaction would be paid. (Vol. I, 46). Mr. Pappas did not become fully aware of the continuing existence of the said mortgage until some seventeen months later. (Vol. I, 27).

The third count stems from the same transaction as in Count II above, wherein petitioner, during the period between July, 1972, and January, 1974, issued to the Kissell Mortgage Company four different checks which were dishonored and returned for insufficient funds (Vol. I, 94-96), one of them twice dishonored. (Vol. I, 99). Some of Petitioner's checks were issued on his escrow account and others were from his own personal bank accounts. (Vol. I, 95). The checks were issued in petitioner's attempt to make monthly payments on the existing note and mortgage for the realty of Mike H. Pappas.

Count IV relates to petitioner's failure to promptly file a workman's compensation settlement after insurance proceeds were endorsed by his client, James E. Lewis, to petitioner in the sum of $7,090.63. (Vol. II, 49). Petitioner was to place said proceeds into an escrow account and pay to Mr. Lewis the said proceeds upon approval of the settlement by the Workman's Compensation Board. (Vol. II, 5). Petitioner gave Mr. Lewis random payments until September, 1973, when he tendered a check to Mr. Lewis for $5,500 which was returned for insufficient funds. (Vol. II, 13).

Count V relates to petitioner's failure to promptly file a petition for bankruptcy to Bobby G. and Linda K. Shelton, when in fact the Sheltons had paid petitioner's fees in full. (Vol. II, 103). Petitioner had falsely told the Sheltons he had filed suit when in fact he had not. (Vol. II, 107). This count was not considered in the opinion of the Kentucky Court of Appeals.

An answer to this charge was duly filed by petitioner,

and the Inquiry Tribunal ordered that a trial hearing be held. Thereafter, a trial committee consisting of William E. Johnson, Chairman (commissioned by the Chief Justice of the Kentucky Court of Appeals to try the issues of the case); Ephraim K. Lawrence, Jr., and John L. Arnett, conducted the hearing held on November 6, 1974, into the early morning of November 7, 1974. This trial committee recommended in its report to the Board of Governors, filed January 7, 1974, that petitioner be given a reprimand deemed proper by the Court of Appeals. Chairman Johnson made a separate recommendation that petitioner be given a public reprimand and censure by the court. (See RCA 3.380). The trial committee's conclusion of law was that petitioner was guilty of unprofessional and unethical conduct by failing to place funds paid to him in an identifiable escrow bank account in the James Hollie Taylor matter; by paying to Mr. Taylor the proceeds two months after they were received by his check on an account having insufficient funds; by failing to promptly satisfy the mortgage in the Mike H. Pappas matter so that Mr. Pappas would not be harrassed by the mortgagee; by making payments to the said mortgagee which were returned for insufficient funds; by failing to promptly file voluntary petitions in bankruptcy for his clients, Mr. and Mrs. Shelton; by failing to promptly seek approval by the Workman's Compensation Board in the James E. Lewis matter, resulting in inconvenience and delay to Mr. Lewis in receiving the settlement funds; and by paying Mr. Lewis part of the settlement by a check which was returned for insufficient funds.

Thereafter, the Board of Governors on January 18, 1975, considered the trial committee's report, reviewed the entire record, and unanimously recommended to the Kentucky Court of Appeals a finding of guilty, and that petitioner be permanently disbarred from the practice of law in the Commonwealth and be required to pay the costs in this action. Pursuant to these recommendations, the court issued a rule to show cause why the Board of Governors recommendation should not be made final. The petitioner duly filed a response on May 4, 1975. On May 9, 1975, the Kentucky Court of Appeals rendered a Per Curiam Opinion, all Justices sitting, disbarring petitioner from the practice of law. Petitioner filed a Petition for Rehearing on June 9, 1975, respondent answered and the petition was denied on June 27, 1975.

ARGUMENT

The issues raised by the petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Kentucky Court of Appeals in disciplining an officer of the court.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by petitioner in his

Petition for Rehearing before the Kentucky Court of Appeals were whether or not the disciplinary proceedings by the Kentucky Bar Association and the court were conducted in such a way as to deny him rights of procedural due process under the Fourteenth Amendment of the United States Constitution. The court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds..

Under the Rules of the Court of Appeals and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved. The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The court has clearly stated this position in its Opinion below citing ***Kentucky State Bar Association v. Stivers***, Ky., 475 SW2d 900 (1972), stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken: The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904.)

* * *

"But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904.)

* * *

"In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904.)

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the trial committee concerning recommended discipline. Its judgment concerning factual issues agreed with the recommendations of the trial committee and the Board.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

Another issue raised by the petitioner in his brief before the Court of Appeals concerned the evidentiary findings and recommendations made by the trial com-

mittee. This issue was clearly defined by the court upon independent non-federal grounds. The court held that the report and recommendations of the trial committee and Board were only advisory.

The court in its role as fact finder specifically and unequivocally held:

> "We review the record and arrive at our own conclusion as to the proper disposition of the case. The record here is voluminous and covers in minute detail every aspect of the counts contained in the charge. Without a tedious detailing of the facts, the record clearly discloses that in three cases the respondent wrongfully withheld his clients' funds for varying periods of time, and in each case one or more times issued checks which were returned for 'insufficient' funds. The respondent's conduct as revealed in this record is so bizarre that we cannot imagine any reasonable explanation, and the attempted explanation for the conduct strains the bounds of credulity. In short, we find no satisfactory explanation which could mitigate the seriousness of respondent's conduct. We are of the opinion that the conduct of respondent portrays such a pattern of dishonesty and lack of ethical standards in dealing with his clients, that he is no longer fit to be a member of the bar." (Petition, Appendix, page 2a.)

After firmly placing its opinion on uncontroverted facts found in the record formed by the trial committee at a

due process hearing and so admitted by petitioner, the court then drew an inference, the *only* inference that can be drawn from a record devoid of factual defenses to the facts found by the court:

> "The only inference which can be drawn from the testimony in this record is that the respondent converted his clients' funds to his own use. The checks returned for 'insufficient funds' from different bank accounts in the circumstances presented here, without any credible explanation, can only mean that the clients' funds were no longer intact and were converted by the respondent to his own use. This conduct warrants the permanent disbarment of an attorney from the practice of law. In re Waxman, 290 Ky. 277, 160 SW2d 587 (1942)."
>
> * * *
>
> "Respondent's argument that his clients did not suffer a loss and that all funds were finally paid cannot be considered mitigating in the circumstances presented here." (Petition, Appendix, pp. 2a - 3a.)

It is interesting to note that petitioner produced no bank records whatsoever to support his defense. It is submitted, by inference, that the records would not have supported a defense but would have been damaging to his only defense based on uncorroborated, self-serving statements. The record clearly shows the upset and inconvenience his clients suffered by petitioner's highly

unprofessional and unethical conduct. The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals of Kentucky and the sound standards of conduct applied to those facts by the court.

II

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE KENTUCKY COURT OF APPEALS DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 10 of his Petition that *In re Ruffalo*, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari.

Ruffalo v. Mahoning County Bar Association, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections or even granted a Petition for Writ of Certiorari based on a state disciplinary proceeding, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures.

In furtherance of respondent's statement before the Kentucky Court of Appeals and set forth in footnote 3 of the Petition, page 9, it is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young

University, Provo, Utah, September 5, 1975.

The constitutional issues raised by petitioner are moot because Rule 3 of the Kentucky Court of Appeals affords a lawyer complete procedural due process of law by any standard. No critical due process question is raised by petitioner. Respondent is aware of no nationwide issue being raised in this case. No evidence is presented of these constitutional issues being raised in any other state proceeding either at the state level or before this Court.

(a) **There is no denial of due process where a lawyer is not given any opportunity for a hearing before the Board of Governors.**

Petitioner states that a 15-man Board of Governors considers disciplinary cases. There are 17 Board members that hear disciplinary cases. Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designed and commissioned by the Chief Justice of the Kentucky Court of Appeals to try the issues in the proceeding. (Petition, page 5.)

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Kentucky Court of Appeals, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, complaints were filed and investigated alleging matters of severe unprofessional conduct. Notice was given of the complaints and timely responses were filed. The Inquiry Tribunal appointed by the Chief Justice of

the Kentucky Court of Appeals reviewed the complaints and responses and determined that probable cause existed to conclude that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charges and filed a timely answer thereto. A full due process hearing was held in a "de novo" climate. The advisory trial committee report, the charge and transcript of proceedings before the trial committee were reviewed by the Board of Governors without the presence of counsel on either side. The following order appears in the Board's minutes of January 18, 1975:

> "The President excused from the room all persons whose presence was not authorized pursuant to the Rules as they relate to the consideration of disciplinary cases. In Executive Session, the Board considered the disciplinary case of John W. Collis."

This order answers allegations in the Petition, footnote 2, page 7, concerning compliance with Rule 3 of the Kentucky Court of Appeals. The Board of Governors had three alternatives: dismiss charges, issue a private reprimand or recommend public discipline to the Kentucky Court of Appeals. If the first two alternatives had been exercised, the case would have terminated without any detriment to petitioner and the Board's sole function as a "screening device" would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to ***recommend*** to the Kentucky Court of

Appeals discipline in the form of disbarment. At that point, a possible point of detriment to petitioner, the court issued a rule to show cause submitting to petitioner the advisory trial committee report and order of the Board. Petitioner at that point, again, had an opportunity to file a response to the rule and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Kentucky Court of Appeals was rendered, petitioner exercised his rights to file a petition for rehearing wherein new issues were presented to the court. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Kentucky Court of Appeals.

The disciplinary proceedings of the Kentucky Court of Appeals are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the

matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962).

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device". A charge can be dismissed by the Board, however, *no* public discipline can be ordered so there is *no final* action taken by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the record produced at the due process hearing. The use of this "screening device" is based on state law and raises no federal due process issue. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 30.170) and inherent power of the Kentucky Court of Appeals (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary file and has the opportunity to respond to a rule to show cause and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the trial committee and the Board or the court in this case. All three members of the trial committee recommend a *public* reprimand by the Court of Appeals. Had the "Board" step of the proceeding been eliminated, the case would have gone to the Kentucky Court of Appeals for determination of factual matters and the degree of discipline to be ordered. Petitioner, at page 6 of his Petition, is in error when he

states the trial committee recommended a private reprimand. There is only an issue raised by the Board's order as to the degree of discipline to be ordered. The Board recommended disbarment. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The test of ***Willner v. Committee on Character***, 373 U.S. 96, 105 (1963) is sustained by Kentucky disciplinary rules. Petitioner had notice and, in fact, answered as fully as he could before the Inquiry Tribunal, the trial committee and the court before final discipline was ordered. He was also heard before the court on a Petition for Rehearing. There is no rule that prohibited petitioner from requesting an oral argument before the court. Petitioner never moved the court for an oral argument.

(b) **The absence of a full factual inquiry before the Justices of the Kentucky Court of Appeals in person where the court judges all factual issues does not deny due process.**

The aforesaid issue was not raised before the Kentucky Court of Appeals and is, therefore, not properly before this Court; however, the issue will be discussed.

The Court of Appeals did give weight to the findings of the trial committee and the Board of Governors. The court made the same finding as the two lower bodies in relation to the numerous checks given clients and returned because of "insufficient funds". The court stated it drew an inference in stating the funds had been converted

to petitioner's own use. The record is void of any evidence whatsoever showing this was not the case. Had the inference been eliminated from the opinion, the result would have been the same. The clients' funds were not intact. Disbarment results under that fact situation. This case is not unlike the case of ***Kentucky Bar Association v. Judy Ward Smith***, Ky., 492 SW2d 880 (1973), certiorari denied, 414 U.S. 859, where the Court of Appeals, exercising its fact finding authority, found from the record that Ms. Smith was guilty of various crimes and perjury at the trial hearing from the transcript formed before the trial committee and disbarred her even though she was given no hearing in these "new findings" before the court. This Court denied her Petition for Writ of Certiorari when the Kentucky court's action was challenged.

Petitioner argues that there is a de novo proceeding before the Kentucky Court of Appeals. This is not an accurate statement. The court must and in this case did make its findings from the record produced at a full due process hearing. In no way was this hearing's product reduced to insignificance before the Kentucky Court of Appeals. Only the degree of discipline imposed was increased from the recommendation of the trial committee. This due process hearing was further reinforced by a rule to show cause before the Kentucky Court of Appeals together with a Petition for Rehearing.

The ***Willner*** case is certainly not the key to this case as contended by petitioner. (Petition, page 17.) As stated by petitioner, the New York Appellate Division relied on an ***inadequate*** report of a committee on character and

fitness in a bar admissions case where the committee held no due process hearing. Petitioner admits a full due process hearing before the trial committee. The product of this hearing formed the record before the Kentucky Court of Appeals: a complete, accurate and fair record. Petitioner at all stages of response answered as fully as he could to all counts of the charge. The Petition for Rehearing permitted the Kentucky Court of Appeals to correct any error it may have made in its opinion. There were no errors. No corrections needed to be made.

Petitioner states that *In re Noell*, 93 F.2d 5 (8th Cir., 1937), holds that an attorney was denied due process where a commissioner reported his findings and recommendations to a state court, which overruled the attorney's exceptions without a hearing. The case does not hold that statement of law. The Circuit Court of Appeals *did not* have the state proceeding before it. The *Noell* case concerned a federal disciplinary case before a federal court.

No Kentucky lawyer is disbarred before the Kentucky Court of Appeals without first having his due process rights fully protected by the rules of that court. Full constitutional safeguards are given a lawyer.

III
THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the Kentucky Court of

Appeals is based soundly on facts in the record before it. The court considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A fair reading of the record supports the entire opinion of the court. The opinion clearly states the evidence it found in the record to support its findings. The court applied a clear standard to the facts citing the public peril resulting from petitioner's actions and its grave effect on the image of the bench and bar. Disbarment is the only responsible action the Kentucky Court of Appeals could take to protect the public from the gross, dishonest misconduct of petitioner.

Petitioner has misapplied the case of ***Kentucky State Bar Association v. Jones***, Ky., 372 SW2d 794 (1963), to the facts of this case. Jones received a public reprimand for failure to promptly disburse a client's funds. Petitioner did not have his clients' funds when he sought to distribute them. On November 11, 1969, by RCA 3.130, the Kentucky Court of Appeals adopted the American Bar Association Code of Professional Responsibility as a sound stardard of conduct required of lawyers and that charges can be preferred where those standards are not met. The following provisions of the Code have obviously been breached by petitioner:

DR 1-102 Misconduct

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty. . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank account maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.

EC 9-5 of the Code States:

> Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

This Court has made clear the strong state interest of state courts in disciplining its members in the recent case of ***Goldfarb v. Virginia State Bar, et al.***, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of

> administering justice, and have historically been 'officers of the courts'. See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on factual issues before this Court. If the Kentucky Court of Appeals gave little significance to the petitioner's evidence, it was due to the lack of credibility of the evidence and not due to an oversight on the part of the court. Here again, petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of October, 1975, I served on Honorable Eugene Gressman, 1828 L. Street, N.W., Washington, D.C. 20036, and Honorable Robert J. Turley, 207 First Federal Building, Lexington, Kentucky 40507, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

LESLIE G. WHITMER